STATE OF MICHIGAN

COURT OF APPEALS

PIA ROBERTSON, Plaintiff-Appellant,	UNPUBLISHED March 17, 2011
v	No. 293877 Wayne Circuit Court
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant-Appellee.	LC No. 08-124006-NF

Before: K. F. KELLY, P.J., and BORRELLO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of no cause of action entered in favor of defendant following a jury trial. For the reasons set forth in this opinion, we affirm.

Plaintiff sought to recover uninsured motorist benefits from defendant after she was injured in an automobile accident. The accident occurred on October 17, 2006, when plaintiff's automobile rolled over and came to rest in the median of I-75 near Troy, Michigan. At trial, the issue was whether the accident fell within the uninsured motorist provision of her automobile insurance policy with defendant. In order to recover benefits under the policy, a hit and run vehicle must have struck plaintiff or plaintiff's vehicle. The jury decided that a hit and run vehicle did not strike plaintiff's car. Thereafter, the trial court entered a judgment of no cause of action in defendant's favor.

Plaintiff first argues that she is entitled to a new trial because the jury was permitted to view a traffic crash report in violation of MCL 257.624 during defense counsel's opening statement. Plaintiff preserved this argument by objecting to defense counsel's display of the traffic crash report before the jury. Whether MCL 257.624 prohibited displaying the traffic crash report is a question of law that this Court reviews de novo. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). We review for an abuse of discretion a trial court's decision to admit evidence. *Barnett v Hidalgo*, 478 Mich 151, 158-159; 732 NW2d 472 (2007).

An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Id.* at 158.

MCL 257.622 requires the completion of a traffic crash report following an accident that causes personal injury.[1] MCL 257.624 provides that "[a] report required by this chapter shall not be available for use in a court action . . . ." Sergeant Danny Daniel prepared such a report in connection with plaintiff's accident. During his opening statement, defense counsel displayed to the jury a large blow up of Sgt. Daniel's report. The second page of the report states:

> Veh #1 [plaintiff's vehicle] was S.B. in center lane when a truck entered her lane. She abruptly changed lanes and due to water in roadway lost control spinning into the median.

Plaintiff contends that the statement in the report tends to imply that no other vehicle struck her vehicle and that she simply lost control of her car because of the wet road conditions.

In support of her argument, plaintiff relies on *Germiquet v Hubbard*, 327 Mich 225, 228-229; 41 NW2d 531 (1950). In *Germiquet*, a deputy sheriff was permitted during his testimony to refer to an accident report required under CL 1948, § 256.330, the predecessor of MCL 257.624. When asked what a driver told him at the scene of the accident, the deputy read the driver's statement that he wrote in his report. *Id.* On cross-examination, the deputy admitted that he had no recollection of what the driver had told him and that the report did not refresh his recollection. He stated that his knowledge was limited to the fact that he filled out the report. *Id.* at 229. Our Supreme Court acknowledged that the report itself was inadmissible pursuant to the statute. *Id.* at 233. The Court determined that allowing the deputy to read from the report resulted in placing a portion of the report in evidence before the jury. The Court further stated:

> If under a situation of the character presented in the instant case, the report, or any part of it, can be put in evidence by reading it to the jury, the obvious purpose of the legislature is defeated. The statute forbids such use of the report. [*Id.*]

In this case, defense counsel displayed the blow up of the traffic crash report during his opening statement and allowed the jury to read the report. In effect, then, the report was evidence:

> It has been ruled in Michigan that evidence exhibited to the jury but not offered or introduced is to all intents and purposes considered as evidence. The use of evidence in court inadmissible by direct offer, cannot be condoned—entry through the back door cannot be allowed where entry through the front door has been refused. [*People v Brisco*, 15 Mich App 428, 429; 166 NW2d 475 (1968).]

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[1] The parties refer to the report as a "UD-10," as indicated at the top of the traffic crash report. The report also states that it is required under MCL 257.622.

The plain language of the current version of MCL 257.624 expressly provides that "[a] report required by this chapter shall not be available for use in a court action . . . ." The use of the word "shall" in a statute indicates a mandatory provision. *Michigan State Employees Ass'n v Dep't of Corrections*, 275 Mich App 474, 480; 737 NW2d 835 (2007). Thus, it is mandatory that traffic crash reports are not to be admitted as evidence. Defense counsel's display of the blow up of the traffic crash report during his opening statement made the report available for use in a court action in violation of MCL 257.624; thus, allowing the jury to view the traffic crash report constituted error.

The trial court's error in allowing the jury to view the crash report was harmless error, however, and does not warrant a new trial, as plaintiff contends. In *Germiquet*, our Supreme Court ruled that the erroneous referral to the crash report required reversal and remand for a new trial. According to the Court, the error was not harmless because "the determination of the questions involved depended on the weight given by the jury to the testimony of the witnesses" and the deputy's improper referral to the crash report "tended to corroborate defendant's testimony, and also to impeach the claims of the plaintiffs . . . ." *Germiquet*, 327 Mich at 234. Thus, the Court concluded, "[i]t cannot be said that such testimony did not materially affect the conclusions of the jury." *Id.* at 235.

Germiquet is distinguishable from the facts of the instant case, however, because in *Germiquet*, the deputy who prepared the crash report and testified regarding the contents of the report at trial had no independent recollection of the information in the report; rather, his testimony was based entirely on the report. *Id.* at 229, 231-232. In contrast, in this case Sgt. Daniel independently recalled that plaintiff did not report the accident as a hit-and-run accident and that there was no indication that another vehicle was involved. He also recalled plaintiff telling him within minutes after the accident that a truck had changed lanes and that she then changed lanes abruptly before losing control of her vehicle and spinning out on the wet pavement.

MCR 2.613(A) provides: "An error in the admission or the exclusion of evidence . . . is not ground for granting a new trial for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice." The main issue in this case was whether another vehicle struck plaintiff's vehicle. Plaintiff testified that a truck struck her vehicle, while Sgt. Daniel testified that there was no contact between another vehicle and plaintiff's vehicle. For reasons that will be discussed more fully below, Sgt. Daniel's testimony regarding the lack of contact between another vehicle and plaintiff's vehicle was properly admitted. Thus, unlike in *Germiquet*, the jury in this case made its determination by resolving conflicting evidence that was properly admitted. Because the improperly admitted crash report was merely cumulative of Sgt. Daniel's properly admitted testimony, any error in its admission was harmless. See *Sackett v Atyeo*, 217 Mich App 676, 685; 552 NW2d 536 (1996).

Plaintiff next argues that the trial court abused its discretion in admitting Sgt. Daniel's opinion testimony that there was no contact between plaintiff's vehicle and another vehicle. According to plaintiff, such testimony was inadmissible because Sgt. Daniel did not observe the accident, and he does not have training or experience in conducting accident reconstructions. Furthermore, plaintiff contends that Sgt. Daniel's testimony was unduly prejudicial because it

addressed the principal issue in the case, which was whether another vehicle came into contact with plaintiff's vehicle. To preserve a challenge to the admission of evidence for appellate review, a party must object in the trial court on the same basis asserted on appeal. MRE 103(a)(1); *Klapp v United Ins Group Agency, Inc (On Remand)*, 259 Mich App 467, 475; 674 NW2d 736 (2003). Plaintiff preserved this issue by objecting to Sergeant Daniel testifying to the effect that no contact occurred between plaintiff's vehicle and another vehicle.

Sgt. Daniel arrived at the scene of the accident within a minute or two of its occurrence. He is a certified traffic investigator, and he personally investigated the accident and took a statement from plaintiff. Therefore, his testimony was relevant under MRE 701 because it was rationally based on his perception and was helpful to a determination regarding whether another vehicle struck plaintiff's vehicle. Moreover, Sgt. Daniel's testimony it was not unduly prejudicial under MRE 403. Evidence is unfairly prejudicial when there is a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). In this case, Sgt. Daniel's testimony was more than marginally probative, and it is not the sort of evidence that carries a high risk of confusion and misuse. Moreover, the fact that Sgt. Daniel is not an accident reconstructionist goes to the weight of his testimony, rather than admissibility. *McPeak v McPeak (On Remand)*, 233 Mich App 483, 493; 593 NW2d 180 (1999) (limitations on a witness' qualifications pertains to the weight to be given to their testimony, not to its admissibility). Furthermore, lay opinion testimony is permitted when, as in this case, it is rationally based on the witness' perception and is helpful to a clear understanding of a fact at issue. *Id.* The trial court did not abuse its discretion in permitting Sgt. Daniel to testify that there was no contact between another vehicle and plaintiff's vehicle.

Plaintiff also takes issue with the following questioning of Sgt. Daniel by defense counsel regarding who was at fault for the accident:

> *Q.* Okay. Does your investigation then typically involve a determination of fault?
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> *A.* Yes, sir, it does.
>
> *Q.* Did you do that in this case?
>
> *A.* Yes, sir.
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> *MR. DRAZIN* [plaintiff's counsel]: Your Honor, I –
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> *MR. ASHTON* [defense counsel]: I'm not asking.
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> *MR. DRAZIN*: Well –
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> *MR. ASHTON:* I'm not.
>
> *THE COURT*: Wait for the question.
>
> *Q.* (By Mr. Ashton) Did you do that in this case?

A. Yes, I did.

Q. All right, I'm not asking what your determination was.

* * *

Q. Sgt. Daniel, from the statement or statements you obtained from Ms. Robertson at the scene, from your investigation of the scene of this accident and your inspection of her vehicle, given the weather conditions that existed back on October 17 of 2006, did you come to a conclusion as to who was at fault for causing this accident?

MR. DRAZIN: Objection.

THE COURT: The objection is sustained.

MR. DRAZIN: Thank you, your Honor.

THE COURT: I thought we covered this. We covered this before.

MR. ASHTON: Well –

THE COURT: No, Counselor.

MR. ASHTON: Well, to respond, your Honor, I think you wanted to see how –

THE COURT: No, excuse me. When we make a ruling I don't intend to keep repeating those rulings. Let's continue please.

MR. ASHTON: All right. I'll withdraw the question.

Citing *Miller v Hensley*, 244 Mich App 528; 624 NW2d 582 (2001), plaintiff contends that it was error for the trial court to admit testimony regarding plaintiff being at fault for the accident. Sgt. Daniel did not testify that plaintiff was at fault, however, because the trial court plainly sustained plaintiff's objection to the testimony and prevented such fault testimony from being admitted. Contrary to plaintiff's argument on appeal, the trial court did not commit an abuse of discretion in this regard.

Plaintiff further argues that the trial court admitted improper negative evidence when it permitted Sgt. Daniel to testify that plaintiff did not report the accident as a hit-and-run accident, that he did not believe that another vehicle was involved because no one told him that another vehicle had struck plaintiff's car, and that he did not initiate a "be on the lookout" for the alleged hit-and-run vehicle. "Negative evidence is evidence to the effect that a circumstance or fact was not perceived or that it was, or is, unknown." *S C Gray, Inc v Ford Motor Co*, 92 Mich App 789, 810; 286 NW2d 34 (1979). Such evidence generally has no probative value and is inadmissible. A negative response to a question, however, does not necessarily constitute negative evidence. *Id.* Here, Sgt. Daniel did not testify regarding circumstances or facts that were not perceived or

unknown. Rather, he testified that plaintiff did not report the accident as a hit-and-run accident and that there was never an allegation that another vehicle was involved. As such, he did not initiate efforts to locate a hit-and-run vehicle. Thus, Sgt. Daniel did not testify regarding negative evidence.

Plaintiff next argues that she is entitled to a new trial because the trial court allowed the jury to read the written remarks of EMS first responder Christopher Ahart on a large blow up of his EMS report displayed to the jury during defense counsel's opening statement. Plaintiff preserved her argument for this Court's review by opposing defense counsel's display of the report. Whether the trial court erred by allowing defense counsel to display the report, later ruled inadmissible, during his opening statement is a question of law that we review de novo. *Kloian*, 273 Mich App at 452.

"[T]he purpose of an opening statement is to tell the jury what the advocate will attempt to prove. A party may succeed or fail in this attempt." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 503; 668 NW2d 402 (2003). During an opening statement, an attorney is permitted to make a full and fair presentation of his case and what he intends to prove but he may not refer to clearly inadmissible evidence. *In re Ellis Estate*, 143 Mich App 456, 461; 372 NW2d 592 (1985). Reversal is not warranted, however, if matters asserted during opening statements ultimately cannot be proven under the rules of evidence as long as counsel's assertions were made in good faith. *Id.* "Counsel cannot be expected to anticipate at all times the ruling of the court on evidence he thinks admissible." *Id.*

Although defense counsel displayed the EMS report during his opening statement, it was thereafter ruled inadmissible because no foundation had been established for its admission. The EMS report was not clearly inadmissible at the time that defense counsel made his opening statement, and the record does not show that counsel's display of the report before the jury or his efforts to admit the document were made in bad faith. During his direct examination of Ahart, counsel attempted but failed to establish a proper foundation for the report's admission. Because it appears that counsel's efforts were made in good faith, reversal is not warranted. *In re Ellis Estate*, 143 Mich App at 461.

Finally, plaintiff contends that she is entitled to a new trial because the trial court permitted Ahart to testify to the effect that no other vehicles were involved in the accident. The record fails to support plaintiff's argument. The record shows that defense counsel attempted to elicit such testimony but that Ahart never testified that no other vehicles were involved in the accident. Ahart admitted that he did not know where he obtained the information on his report regarding whether other vehicles were involved and did not recall testifying during his deposition that plaintiff had told him that no other vehicles were involved. Thus, the record does not support plaintiff's argument.

Affirmed. No costs are awarded to either party.

/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello
/s/ Amy Ronayne Krause